

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,  
et al.

CIVIL ACTION

v.

PENNSYLVANIA, et al.

NO. 93-2094

FILED NOV 30 1994

HARRY NELSON, et al.

v.

KAREN F. SNIDER, et al.

O R D E R

AND NOW, this 30<sup>th</sup> day of November, 1994, upon consideration of plaintiffs' Motion for Final Approval of the Proposed Settlement Agreement, joined by defendants, it is hereby ORDERED that said motion is GRANTED.

These consolidated actions were brought by the United States of America (and, as intervenor, People Interested in Embreeville Residents, a group comprised mainly of relatives of residents of the Embreeville Center), a class of residents of the Embreeville Center and those at risk of placement at the Embreeville Center, and Pennsylvania Protection and Advocacy, Inc. and The Arc-Pennsylvania (two non-profit advocacy corporations). The suits seek injunctive relief against the Commonwealth of Pennsylvania and several of its officials to redress allegedly unconstitutional conditions at the Embreeville Center, a state institution for the mentally retarded.

After discovery was completed in this case, and on the eve of trial, the parties reported to the Court that a settlement agreement had been consented to by all parties. A mechanism for

providing notice to all interested parties and for giving said parties the opportunity to comment on the proposed settlement was implemented, and a hearing on the motion to approve the settlement agreement was scheduled for November 29, 1994. No objections to the settlement agreement were voiced either prior to or during the November 29 hearing.

As noted above, this case is a consolidation of two cases, one of which is a class action. Different standards govern the approval of settlements of class actions and non-class actions. Therefore, the settlement agreement need be addressed under one standard for the United States and PIER as plaintiffs portion of this case and under another for the class portion of this case.

To approve a non-class action settlement the district court must conclude that the parties have validly consented; that reasonable notice has been given to possible objectors; that the settlement is fair, adequate and reasonable; that the settlement agreement will not violate the Constitution, any statute, or other authority; that it is consistent with the objectives of Congress; and that it will not be unreasonable or legally impermissible as to any third parties affected. Durrett v. Housing Authority, 896 F.2d 600, 604 (1st Cir. 1990). This Court is satisfied, upon the representations of the parties, that the United States, PIER and the Commonwealth of Pennsylvania have all validly consented to the settlement agreement. As mentioned previously, all interested persons and entities have received notice of the proposed settlement agreement.

The settlement agreement can be described as having three major themes. First, it is designed to improve conditions at Embreeville while the facility remains open. Second, it provides for placement of Embreeville residents into the community. Third, it establishes methods by which the rights of the residents will be protected after they are placed in the community. The agreement calls for appointment of a monitor, approved by the Court, who will in turn select a panel of experts to oversee defendants' compliance with the provisions of the settlement. The settlement agreement is comprehensive and detailed; a restatement of its provisions is not necessary here. The Court has reviewed the agreement and is satisfied that it is fair, adequate and reasonable.

The proposed settlement is not violative of any Constitutional provisions, any statutes, or any other authority. In fact, the agreement is drafted to secure the Constitutional and statutory rights of Embreeville residents. Moreover, the agreement is consistent with Congressional objectives. The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq., expresses a Congressional preference for settlement of cases such as this one.

Finally, the proposed settlement agreement does not unreasonably or illegally affect any third persons. The only persons affected by this settlement are the plaintiffs and defendants in the case itself.

In evaluating the fairness of a settlement in a class action, the district court may consider the following:

1) the complexity, expense and likely duration of the litigation;

2) the reaction of the class to the settlement;

3) the stage of the proceedings and the amount of discovery completed;

4) the risks of establishing liability;

5) the range of reasonableness of the settlement in light of the best possible recovery; and

6) the range of reasonableness of the settlement in light of the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).

This case was extremely complex from both a factual and a legal standpoint. This complexity made the case an expensive one to bring to trial, especially in light of the number of expert witnesses required. The trial itself was anticipated to last for several weeks, undoubtedly to be followed by an extensive period of appeals. This first factor weighs in favor of approval of the settlement. The failure of any class member to object to the proposed settlement despite having adequate opportunity to do so demonstrates that the class members assent to the agreement. Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1313-14 & n.15 (3d Cir. 1993).

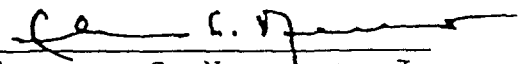
The fact that the settlement agreement was forged on the eve of trial and after the close of discovery leads to the conclusion that the plaintiffs had adequate information at their disposal to evaluate the strength of their case and to make an

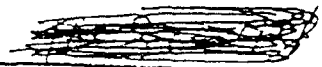
informed judgment as to the adequacy of the agreement. In re General Motors Corp., 846 F. Supp. 330, 334-35 (E.D. Pa. 1993).

The fourth, fifth and sixth factors require that the Court evaluate the plaintiffs' risks of establishing liability and securing the requested relief after trial. While the plaintiffs case appeared to be a strong one, several genuine legal and factual obstacles to their prevailing at trial did exist. Moreover, the plaintiffs sought exhaustive injunctive relief, some of which might not have been awarded by the Court even had the plaintiffs succeeded in establishing liability. The Court could well have structured lesser relief which it felt adequate to protect the rights of the plaintiffs while at the same time posing a smaller burden to the defendants. The settlement agreement confers upon the plaintiffs much of the relief that they sought in filing this case. Considering all of this, the Court finds the agreement to be reasonable and fair.

For the reasons stated, the proposed settlement agreement submitted by the parties is approved.

AND IT IS SO ORDERED.

  
Clarence C. Newcomer, J.

ENTERED:  12-1-94

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

PEOPLE INTERESTED IN EMBREEVILLE  
RESIDENTS,

Plaintiff-Intervenors

v.

COMMONWEALTH OF PENNSYLVANIA;  
ROBERT CASEY, Governor of the Commonwealth  
of Pennsylvania; KAREN SNIDER  
Secretary, Department of Public  
Welfare; NANCY THALER, Deputy  
Secretary for Mental Retardation;  
WILLIAM SNAUFFER, Director,  
Embreeville Center,

Defendants.

HARRY NELSON, by and through his  
next friend, Yvonne M. Husic;  
RICHARD CINQUINA, by and through his  
next friend, Kevin T. Casey; RALPH  
GIPE, by and through his next friend,  
Kevin T. Casey; CHARLIE KRAUT, by and  
through his next friend, Robert M.  
Currier; GERALDINE GLENNON, by and  
through his next friend, Jerome  
Ianuzzi; and EDWIN MATTIA, by and  
through next friend, Carole Ianuzzi,  
on behalf of themselves and all  
others similarly situated;  
PENNSYLVANIA PROTECTION &  
ADVOCACY,  
INC.; and THE ARC-PENNSYLVANIA

Plaintiffs,

v.

Civil Action No.  
93-CV-2094

FILED NOV 30 1994

|                                   |   |              |
|-----------------------------------|---|--------------|
| KAREN F. SNIDER, Secretary,       | ) |              |
| Pennsylvania Department of Public | ) | Class Action |
| Welfare; NANCY THALER, Deputy     | ) |              |
| Secretary for Mental Retardation, | ) |              |
| Pennsylvania Department of Public | ) |              |
| Welfare; and WILLIAM SNAUFFER,    | ) |              |
| Facility Director of Embreeville  | ) |              |
| Center, in their individual and   | ) |              |
| official capacities,              | ) |              |
|                                   | ) |              |
| Defendants.                       | ) |              |

## SETTLEMENT AGREEMENT

### INTRODUCTION

1. These cases were instituted, respectively, by the United States on April 21, 1993, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. Section 1997 et seq., and by the plaintiffs in Civil Action No. 94-CV-440 on January 24, 1994.

2. This Court has jurisdiction over these actions pursuant to 28 U.S.C. Sections 1331, 1343 and 1345.

3. Venue is appropriate pursuant to 28 U.S.C. Section 1391(b).

4. The United States is authorized to institute this civil action by 42 U.S.C. Section 1997a.

5. The plaintiffs in Civil Action No. 93-CV-2094 are the United States of America and Persons Interested in Embreeville Residents ("PIER"). The plaintiffs in Civil Action No. 94-CV-440 are: Embreeville residents Harry Nelson, Richard Cinquina, Ralph Gipe, Charlie Kraut, Geraldine Glennon and Edwin Mattia, all other similarly situated Embreeville residents, the Pennsylvania Protection & Advocacy, Inc. and the Arc-Pennsylvania. The parties stipulate that

Civil Action No. 94-CV-440 is a class action and that the class consists of any individual who is an Embreeville resident, as defined herein.

6. The defendants in Civil Action No. 93-CV-2094 are: the Commonwealth of Pennsylvania; Robert Casey, Governor of the Commonwealth of Pennsylvania; Karen Snider, Secretary of the Pennsylvania Department of Public Welfare ("DPW"); Nancy Thaler, Deputy Secretary of Mental Retardation, DPW; and William Snauffer, Director of the Embreeville Center ("Embreeville"). The defendants in Civil Action No. 93-CV-2094 are sued in their respective official capacities. Mss. Snider and Thaler and Mr. Snauffer are also the defendants in Civil Action No. 94-CV-440, in which they are being sued in their respective individual and official capacities.

7. The individual defendants who are officers of the Executive Branch of the Commonwealth of Pennsylvania have authority and responsibility for the operation of Embreeville.

## I. GENERAL PROVISIONS

A. The parties agree that the care, conditions of confinement and habilitation of Embreeville residents implicate rights of these residents that are secured or protected by the Constitution of the United States. The parties entering into this Agreement recognize these constitutional interests and, for the purpose of avoiding protracted and adversarial litigation, agree to the provisions set forth herein. By executing this agreement, defendants do not recognize a constitutional right to community placements.

B. This Agreement applies to all individuals residing at the Embreeville Center any time between April 21, 1992 and the termination of this Agreement. In addition, those non-



Embreeville residents who will be provided new or improved services under this agreement will have the right under this agreement to utilize the grievance procedures set forth herein, and the quality assurance provisions will apply to them as well. Within 60 days of the execution of this Agreement, defendants will produce to plaintiffs and the Monitor, appointed pursuant to Section IV, Par. A of this Agreement, a list of all Embreeville residents and their current places of residence. Plaintiffs will have 30 days in which to submit to the Monitor any additional names to the list. The Monitor will determine the final list within 30 days.

C. Defendants will condition the disbursement of funds to the Counties for operation of community homes and other community services relating to this Agreement, upon the requirement that the Counties comply with the terms in this Agreement. Defendants will allocate funds to Embreeville residents' county of choice necessary to develop and provide the services and support needed by these residents. Additional state funds will be allocated to participating counties equal to the amount of state funds allocated for residents of Embreeville. These funds are to support unserved and underserved people.

D. Defendants will provide the services required under this Agreement for as long as they are required by the Embreeville residents. Defendants will not reduce services to the residents, unless they no longer require these services or the same level of services, as determined by each resident's Interdisciplinary Team ("IDT").

E. In entering into this Agreement, defendants do not admit any violation of law, and this Agreement may not be used as evidence of liability in any other legal proceeding. Any terms of this Agreement specifically apply only to the factual circumstances of Embreeville. The parties acknowledge that any terms of this Agreement do not apply to other facilities for the

developmentally disabled in Pennsylvania. The parties agree not to use this Agreement in any matter unrelated to this case to argue that any party has conceded that any particular action must be taken at any other facility or institution.

F. Any violation of provisions of this Agreement does not create a private right of action. This Agreement is enforceable only by the parties.

G. The provisions of this Agreement are a lawful, fair and reasonable resolution of this case.

H. This Agreement will be applicable to and binding upon all of the parties in their official capacities, and their officers, agents, employees, assigns and successors.

I. During the term of this agreement, upon no less than 48 hours notice to the Embreeville Director, plaintiffs' counsel and such experts as they choose, will be permitted reasonable access to the records, residents and employees of Embreeville and the places in which the residents reside, work or attend work programs. Plaintiffs will minimize any disruption to the persons, sites and programs they visit. Nothing in this paragraph alters the access rights of Pennsylvania Protection & Advocacy, Inc. or its subcontractors under federal law or state policy. The costs and fees of plaintiffs' counsel and any expert(s) retained by counsel will be borne by plaintiffs for the activities set forth in this paragraph.

## II. DEFINITIONS

As used in this Agreement, the following definitions will apply:

A. "Assistive technology": External devices used by and for individuals with developmental and other physical disabilities to enhance and increase independence, mobility, communication, environmental control and choice, which includes therapeutic equipment designed

to minimize or prevent contractures, physical degeneration, inappropriate body growth and/or deformity, including, but not limited to, wheelchairs.

B. "Advocate": Persons who are acting on behalf of an Embreeville resident covered by this Agreement, or, if the resident is unable to give consent, with the consent of the Monitor.

C. "Behavior Modifying Medications": Drugs which are prescribed or administered for the purpose of modifying behavior. Included are the major and minor tranquilizers and anti-depressants when prescribed or administered for the purpose of modifying behavior. Excluded are drugs that may have behavior modifying effects such as anti-convulsant medications, unless they are prescribed or administered for the purpose of modifying behavior.

D. "Community Homes": A range of living arrangements in typical family scale homes in the community with support, supervision, and habilitation, as determined by the person-centered planning process. Personal care boarding homes, as defined by Pennsylvania law, are specifically excluded from this definition, unless approved by the resident, the resident's family or guardian, the resident's advocate, if any, and the Monitor.

E. "County of Choice": The county in which an Embreeville resident has chosen to live.

F. "Direct Care Worker": Staff immediately responsible for implementing an Embreeville resident's habilitation program and providing care to residents.

G. "Functional Analysis": An assessment of a resident's maladaptive behavior, if any, which includes, at a minimum: (1) a description of the behavior(s); (2) an assessment of behavioral intensity, frequency, topography and duration; (3) as determined to be necessary by professional judgment, an evaluation of the antecedents, function and consequences of the

behavior(s); and (4) as determined to be necessary by professional judgment, an assessment of any medical conditions related to the behavior(s).

H. "Habilitation Program": A program or schedule of steps and activities, including behavior management, designed by qualified professionals to promote acquisition of pro-social, adaptive and self-care skills, prevent regression in those skills already possessed by the resident and/or teach those skills necessary to protect a resident from unreasonable risks to personal safety and to facilitate his or her ability to function free from undue restraints and from unreasonable use of behavior modifying medications.

I. "Physician": A medical doctor lawfully entitled to practice medicine in Pennsylvania.

J. "Psychiatrist": A physician who either is certified by or is eligible for certification by the American Board of Psychiatry and Neurology or who has successfully completed an approved residency program in psychiatry and upon completion of post-residency requirements will become eligible for examination for such certification.

K. "Resident" or "Embreeville resident": Any person who has resided at Embreeville for any length of time since April 21, 1992.

### III. REMEDIAL MEASURES

#### A. Closure of the Embreeville Center

1. Defendants intend to cease operating Embreeville as a facility for individuals with developmental disabilities once all residents have been placed out of the facility. The anticipated closure date is September 30, 1997.

2a. Defendants will place 57 residents into community homes by June 30, 1995. Defendants plan to place at least one half of the remaining residents into community homes by June 30, 1996 and the other half of the remaining residents by June 30, 1997.

2b. If, for any reason, the defendants determine that they will not be able to make the FY95-96 or FY96-97 placements, they will, within five days of such determination, notify the Court and the parties in writing. In the event that the defendants, for any reason, do not make the FY 95-96 or FY 96-97 placements, the United States and the other plaintiffs will have the right to petition the Court for such placements. In the event that further litigation is necessary regarding the issue of community placements, all of the duties of the defendants set forth in this agreement remain in full force and effect.

3. No resident will be placed in an inappropriate or temporary placement in order to meet the deadlines set forth in Subparagraph A.2a. above. No person will be placed in any type of community home other than that determined by the person-centered planning process. The Monitor must approve any placement of a resident in a nursing home.

4. Within 90 days of execution of this Agreement, defendants will, with input from the plaintiffs, prepare and submit to the Monitor a Plan of Implementation for this entire Agreement, including all steps that must be taken to achieve each phase of implementation and compliance by the prescribed dates, the corresponding deadlines for each of these steps and the person responsible for ensuring that each step is accomplished. This plan will be the foundation of the regular meetings of the parties described infra, and the parties will reasonably work together to refine and improve the plan to the extent necessary as the implementation of the agreement progresses. Defendants will implement the plan with the agreed upon refinements.

5. Commencing 90 days after execution of this Agreement, and every month thereafter, defendants and no more than two representatives of each plaintiff party, if they choose, will meet to review the status of implementation of the Plan.

6. Defendants closed admissions to Embreeville Center in 1991 and will not admit any individual into the facility hereafter. Defendants will not admit Embreeville residents to any other state center for individuals with developmental disabilities; however, residents may be readmitted to Embreeville for a period up to 60 days if the resident is required to leave his/her current placement and another appropriate placement does not exist or is not available at that time.

7. Defendants will cease to operate Embreeville as a facility for the developmentally disabled once all residents have been placed out of the facility.

8. All placements of Embreeville residents will be made pursuant to person-centered planning. The person-centered planning process will be directed by the resident and any involved family member, guardian, friend, or advocate, coordinated with the service manager from the resident's county of choice, and include a team of professionals who are reflective of the supports and services needed by the resident. The person-centered planning process will include a written plan containing a detailed description of the types and levels of supports and services necessary for the resident to achieve successful inclusion in the community of his/her choice.

9. In addition to the process for person-centered planning described in Subparagraph A.8 above, the following requirements will apply to the person-center planning process used at Embreeville and the placement of Embreeville residents:

a. The community in which the Embreeville resident wishes to live after discharge will be identified through the person-centered planning process. If that process results in a choice of a

county other than his county of origin, defendants will respect that choice except when the county chosen is unwilling to provide the services in a reasonable manner.

b. Embreeville residents will be informed of their right to choice in the person-centered planning process and their right to request the participation in the person-centered planning process of any individuals they choose.

c. Defendants will provide training to all members of the IDTs in the person-centered planning process and in methods for eliciting active involvement in the process of persons who use services and their families.

d. Defendants will encourage and assist the Counties in developing systems that allow for consumer control of resources. In compliance with Medicaid waiver provisions, defendants will offer to every Embreeville resident and his/her family the option to use consumer controlled resources in securing the services needed by the resident in the community. No resident's use of such options will reduce or alter services to another resident or result in a reduction of service to that resident without his or her consent.

10. All Embreeville residents who move to the community and wish to work in community-integrated employment will be afforded a reasonable opportunity and the reasonable support to do so. Other community-integrated daytime activities will be developed and provided. Alternatives for employment and community-integrated daytime activities will be explored before segregated, facility-based adult day services are considered.

11. Involved family members and guardians of Embreeville residents, along with residents, will have substantial input into all decisions relating to their family members. Family

members will be provided with timely notification of significant decisions concerning medication, treatment and placement.

B. Conditions of Care at the Embreeville Center

1. During the period in which Embreeville is being downsized and prepared for closure, defendants will provide to Embreeville residents appropriate care, habilitation and education and will protect residents from regression in skills, unreasonable risks to personal safety and/or unreasonable risks of restraint.

2. Increased Habilitative and Behavioral Services

a. No later than 12 months from the date of execution of this Agreement, each Embreeville resident will be evaluated for and provided additional habilitative and behavioral services, as determined necessary by the outside expert consultants described below. Defendants will contract with persons or entities from the community who are experts in these areas. The contract or contracts will include funding for expert consultant services and the staff necessary to implement such programs. This program will be phased in according to the following schedule: within 60 days, the 30 residents exhibiting the most serious maladaptive behaviors; within 120 days, the next 30 such residents; and every 30 days thereafter, 30 residents chosen by the defendants until all residents have been assessed by the expert consultants. In order to fulfill these requirements in the time frame enumerated above, the defendants will, in conjunction with the outside expert consultants, develop, as determined necessary by the expert consultants, implement, and review annually for each resident a professionally based habilitation program that provides for sufficient hours of training to enable full implementation of the habilitation program. Each habilitation program will contain, at a minimum, habilitation objectives that are: (i)



developed by an appropriately constituted IDT; (ii) stated separately, in terms of a single behavioral outcome; (iii) assigned projected completion dates; (iv) expressed in behavioral terms that provide measurable indices of performance; (v) organized to reflect a developmental progression appropriate to the resident; (vi) assigned priorities; and (vii) based upon assessments and evaluations. In addition, defendants will encourage the outside expert consultants to consider and review the criteria for habilitation programs set forth in Appendix A to this Agreement.

b. Defendants will reasonably act to promptly and fully implement all recommendations of the outside expert consultants with respect to, inter alia, staff training and data collection.

c. Within 30 days of the completion of the habilitation programs and periodically thereafter, defendants will ensure that all staff directly responsible for implementation of a resident's habilitation program receive training on the elements of the habilitation program of each resident under their care, including target behaviors and appropriate responses thereto, and thereafter have such staff implement the habilitation program.

d. Within 30 days from the execution of this Agreement, defendants will implement procedures, if they have not already done so, to assess and evaluate each resident not less than once annually, and evaluate the data reflecting the conduct of each habilitation program not less than quarterly, in order to ascertain the adequacy and effectiveness of the habilitation program.

e. The Behavior Management Committee ("BMC"), membership of which will include, at a minimum, one representative each of Pennsylvania Protection & Advocacy, Inc., the ARC-Pennsylvania and PIER and the resident's primary care physician, will review on a semi-annual basis those aspects of each resident's habilitation program relating to the resident's maladaptive behavior(s) and relevant progress notes for each resident: (1) who exhibits self-injurious behavior

or causes injury to self or others through aggressive behavior and whose habilitation program includes behavior modifying medication, or (2) who receives behavior modifying medication on an emergency basis. In all reviews conducted by the BMC pursuant to this paragraph, the BMC will ascertain whether (1) there is sufficient behavioral data recorded, (2) such data are reliable, and (3) the continuation of the current habilitation or treatment program is justified, or the program, including medication, should be modified. Where inadequate or unreliable data are found, or the continuation of the habilitation or treatment program is otherwise not justified, the matter will be referred to the appropriate IDT which will, within 30 days from the referral, modify the existing habilitation program as appropriate in accordance with the judgment of the resident's IDT and outside expert consultants.

f. With regard to the review required under Subparagraph 2.e. above, where a habilitation program includes the use of a behavior modifying medication, the BMC will consult with a psychiatrist who will determine and specifically advise the BMC whether the proposed use of the medication is supported by a diagnosis of mental illness (or other medical reason), whether the diagnosis is justified by the resident's history as set forth in his/her written record, and whether the medication and dosage are necessary and appropriate. In making these determinations, the psychiatrist will have observed the resident, examined relevant portions of the resident's medical and behavioral record, and consulted with the resident's primary care physician and psychologist.

g. Defendants will comply with all currently existing state laws and regulations regarding the use of behavior modification techniques.

h. Within 90 days from the execution of this Agreement, defendants will: (1) assess and evaluate, unless already assessed and evaluated, each resident who is Deaf or hearing impaired, to

determine his/her knowledge of sign language or capacity to learn sign language; (2) have at least one staff person capable of communicating in sign language with those individuals who use sign language on duty at Embreeville on a 24-hour basis; and, (3) for those residents determined to be capable of learning sign language and who cannot otherwise communicate with staff, provide appropriate training to develop their sign language communication skills.

### 3. Medication

a. Defendants will ensure that prescription medications are prescribed for and administered to residents pursuant to the exercise of judgment by a qualified professional and that they will not be used as punishment, in lieu of a habilitation program, or for the convenience of staff. In order to fulfill this requirement, defendants will:

(1) Within 90 days from the execution of this Agreement, initiate and implement a system which requires that every behavior program that utilizes behavior modifying medication specifies: (a) the behavior and/or symptom that requires initiation or use of the behavior modifying medication; and (b) the behaviors to be taught to the resident to replace the behavior that initiates the use of the behavior modifying medication or other program to reduce or eliminate, if appropriate, the use of the behavior modifying medication.

(2) Within 90 days from the execution of this Agreement, justify the use of the behavior modifying medication by written evidence in the resident's record that other, reasonable less restrictive techniques have been tried as part of a habilitation program and have been demonstrated to be ineffective.

b. Within 30 days from the execution of this Agreement, defendants will: (1) administer prescription medication only upon order of a physician and behavior modifying medication only

upon order of a physician after consultation with a psychiatrist, except in case of an emergency use of behavior modifying medication, in which case consultation must be had within 24 hours of the order being written; (2) establish procedures to review the drug regimen of each resident every month; (3) require that no prescription is valid for more than one month; (4) have a physician note in the record of each resident receiving behavior modifying medication the mental illness diagnosis or other medical reason for which the medication is prescribed and the justification for the dosage level; (5) evaluate each resident receiving behavior modifying medication for drug induced side effects, including tardive dyskinesia, kidney and liver dysfunction, and neuroleptic malignant syndrome, at professionally determined intervals; (6) permit to administer medication only those staff qualified under State law to do so; (7) record in each resident's record and report to appropriate professional staff any medication error or adverse drug reaction; (8) ensure that behavior modifying medications are prescribed or discontinued pursuant to professional judgment; (9) ensure that all residents with a seizure disorder are prescribed the fewest number of different medications appropriate for effective seizure management, consistent with professional judgment.

c. Within 30 days from the execution of this Agreement, a psychiatrist will, upon request of the IDT or at the psychiatrist's own request, serve on the IDT of any resident whose individual plan of service includes the use of behavior modifying medication or for whom such has been recommended.

#### 4. Medical Care

a. Defendants will provide Embreeville residents with adequate medical care, including adequate medical specialty services.

b. Primary care physicians at Embreeville will be responsible for and oversee the provision of coordinated health care for the residents for whom they are responsible. Primary care physicians will, in a timely manner: (1) conduct comprehensive evaluations of all residents for whom they are responsible; (2) determine what specialized medical services are required for the residents for whom they are responsible and ensure that such services are timely obtained; (3) review and respond to all recommendations of outside medical specialists and laboratory findings, documenting what action has been taken and the reasons therefor; and, (4) communicate directly with contract and other medical providers.

c. A registered nurse or physician will monitor infection control at Embreeville. The registered nurse or physician will: (1) review all culture reports and physician orders for antibiotics; (2) review and assure the quality of management plans for infections occurring in individual residents or groups of residents; and, (3) develop comprehensive training materials and, thereafter, train the medical and direct care workers on proper infection management procedures.

d. Defendants will provide all staff physicians, registered nurses ("RNs"), licensed practical nurses ("LPNs"), and Nurse Supervisors, who regularly provide services on-grounds at Embreeville, with systematic, periodic training in emergency procedures, including the proper way to administer cardio-pulmonary resuscitation. Thereafter, defendants will evaluate the competence of all participating staff to perform emergency medical procedures that they are required by law, policy, or professional standards to know, document such evaluations and provide such additional training as the evaluations indicate are necessary to ensure staff competence in emergency procedures.

e. Defendants will make medication and equipment to be used in case of emergency readily available to qualified staff in each residential unit. The functioning of all emergency equipment will be tested and documented at least weekly.

f. Defendants will implement a protocol requiring Embreeville staff to obtain from any acute care hospital a timely, comprehensive record of the diagnosis, course of treatment while at the hospital, and prescribed treatment for each Embreeville resident who may be transferred and treated at such hospital.

g. Defendants will ensure that all Embreeville residents receive adequate and timely dental care, including dental hygiene.

h. Within 120 days from the execution of this Agreement, neurologist(s) will examine each Embreeville resident receiving anti-convulsant medication who has not been examined by a neurologist in the 180 days prior to the execution of this Agreement to determine whether the medication treatment is justified. Thereafter, neurologists will evaluate and diagnose Embreeville residents who are referred to them by primary care physicians and: (1) examine, not less than once annually, and recommend treatment for residents receiving two or more anticonvulsant medications or who have had five or more seizures in the preceding 12-month period; (2) examine and recommend for treatment, with a frequency determined by their medical judgment, other residents receiving medication to control seizures; and, (3) recommend treatment for all residents who are diagnosed as having other neurologic disorders. In performing these duties, the neurologist(s) will confer with the referring primary care physician and, as appropriate, with the assigned psychiatrist and promptly record notes in the resident's medical records that reflect the neurological diagnosis, recommended course of treatment, and results.

i. Upon the execution of this Agreement, defendants will, periodically but not less than once annually, use the services of expert medical specialists who will train Embreeville primary care physicians and nursing staff in the diagnosis and treatment of medical problems typically associated with persons with developmental disabilities, including: (1) neurologic disorders, including seizures and specifically the prescription of medication to control seizures; (2) orthopedic and psychiatric conditions; (3) gastroenterologic disorders and proper nutrition; and, (4) behavioral and psychiatric disorders, including the psychopharmacologic treatment of such disorders, and side effects of behavior modifying medication. Defendants will document that such training occurred, including maintaining a list of those in attendance as well as clinical areas covered.

j. Within 90 days from the execution of this Agreement, defendants will initiate regular, periodic training for all direct care workers on how to recognize seizures and the action to take in the event a resident has a seizure in their presence.

k. Within 90 days from the execution of this Agreement, defendants will initiate, as necessary, periodic training for physicians and nurses on the common side-effects of behavior modifying medication in use at the facility.

##### 5. Physical and Occupational Therapy

a. Within 120 days from the execution of this Agreement, each resident with orthopedic or neuromuscular disabilities will be reviewed or evaluated by a qualified physician to determine whether physical or occupational therapy services should be initiated, or whether an existing plan should be modified, to prevent contractures, physical degeneration, inappropriate body growth and/or deformity. Any resident identified as needing additional services will promptly be referred

to an appropriate, qualified registered physical therapist ("RPT") or licensed occupational therapist ("LOT"). Within 30 days of such referral, the RPT or LOT will assess and evaluate the resident and develop an individualized physical therapy, occupational therapy, or positioning plan, and thereafter, review and modify, as necessary, any such plan. Such plans will identify all assistive technology necessary to achieve proper body position, balance or alignment. The plan will specify the reason for each support, the situations in which each is to be applied, the schedule for the use of each support and the individuals responsible for applying the support in each situation. If there is a decision not to provide therapy to a particular resident, the basis for that decision will be documented. Physical or occupational therapy services will be implemented promptly after any physical therapy, occupational therapy, or positioning plan is developed and will be supervised by qualified physical or occupational therapy staff.

b. In addition to any assessments required by Subparagraph 5.a., within 120 days from the execution of this Agreement, all residents who have or use wheelchairs will be reviewed or assessed by a RPT, LOT or outside consultant to determine the appropriateness and safety of their wheelchair and to determine what adaptations are necessary to enhance the resident's body position or alignment or minimize or prevent contractures, physical degeneration, inappropriate body growth and/or deformity.

c. Within 180 days from the execution of this Agreement, defendants will have a registered speech therapist who specializes in the diagnosis and treatment of feeding disorders review or assess each resident who has neuromuscular dysfunction, obstructive lesions, or other physical impairment, or psychological factors or a combination of two or more of these that interfere with eating, to determine whether to initiate a mealtime program or protocol for the



resident or to modify an existing one. Within 30 days of the assessment, the registered speech therapist will develop a written mealtime program for each of those residents for whom such a need is identified, and thereafter review and modify, as necessary, the program. Each such program will be implemented by qualified staff not later than 30 days thereafter.

d. Within 90 days from the execution of this Agreement, defendants will initiate regular, inservice training for direct care workers in how to position physically handicapped residents in wheelchairs and other devices, transfer them from one place or position to another, and implement such aspects of residents' physical therapy or occupational therapy programs that such staff are otherwise qualified and expected to do. Such training will be conducted by RPTs or LOTs.

e. Within 90 days from the execution of this Agreement, defendants will provide regular periodic inservice training for direct care workers on proper methods of feeding residents who have mealtime programs and proper positioning during meals or snacks. Such training must be conducted by registered speech therapists, LOTs or other qualified professionals who specialize in the treatment of feeding disorders.

f. Within 90 days from the execution of this Agreement, defendants will retain an orthopedist(s) or physiatrist(s) for up to 32 hours to identify residents of Hilltop and Meadowview Building who need further assessment for medical, surgical, rehabilitative, or therapeutic services, including therapeutic equipment, to minimize or prevent contracture, physical degeneration, or inappropriate body growth and deformity. All residents so identified will receive timely assessments by an orthopedist or physiatrist. Thereafter, orthopedist(s) and physiatrist(s) will: (1) timely evaluate and diagnose and treat Embreeville residents who are referred to them by primary care physicians; (2) reexamine and treat, with a frequency determined

by their professional judgment, residents with physical handicaps, especially chronic physical handicaps such as contractures and scoliosis; (3) confer with the referring primary care physician on a regular basis; and, (4) promptly record progress notes in the residents' medical records explaining fully the results of the examination, the diagnosis, the recommended course of treatment or recommendation not to treat.

g. Defendants will ensure that Embreeville residents receive all medically necessary assistive technology to achieve proper body position, balance or alignment or to minimize or prevent contracture, physical degeneration, or inappropriate body growth and deformity, and that all such equipment or technology is properly and safely applied.

h. Any assistive technology specifically designed and provided for a resident will accompany that resident upon his/her placement in the community.

#### 6. Staffing

a. Within 90 days from the execution of this Agreement, defendants will hire to work at Embreeville all staff necessary to implement the provisions of this Agreement.

b. In no event will direct care staffing at Embreeville be less than is necessary to ensure the consistent maintenance of direct care staff to resident ratios (on duty) of:

|           |     |
|-----------|-----|
| Day shift | 1:4 |
|-----------|-----|

|               |     |
|---------------|-----|
| Evening Shift | 1:4 |
|---------------|-----|

|             |     |
|-------------|-----|
| Night Shift | 1:8 |
|-------------|-----|

c. Defendants will maintain current staff to resident ratios for primary care physicians and registered and licensed practical nurses.

d. Defendants will employ or contract for at least one psychologist possessing a doctorate in psychology and with demonstrated experience in the field of behavioral psychology, licensed or certified by the Commonwealth, who will have primary responsibility for providing professional supervision, monitoring, and coordination of all psychological services at Embreeville.

e. Defendants will maintain at least the current staff to resident ratios for physical therapy staff, and defendants will ensure that at least one third of physical therapy staff are RPTs, either through employment or contracts.

f. Defendants will, either through employment or contracts, increase current occupational therapy staff by one LOT and will thereafter maintain the occupational therapy staff to resident ratio at that increased level.

g. Within 120 days from the execution of this Agreement, a psychiatrist will conduct an in-person evaluation and record review of every resident currently receiving psychotropic medication, other than residents who have been so evaluated within the past six months. The evaluation will include, inter alia, a decision as to the frequency with which the resident should be reevaluated by the psychiatrist. Defendants will carry out the recommendations of the psychiatrist with respect to frequency of future evaluations. Defendants will retain sufficient psychiatric services to fully implement the recommendations of the psychiatrist.

h. Staff whose primary responsibilities are administrative and who do not provide direct service to residents on a regular, routine basis and staff who are assigned to perform one-to-one monitoring of a resident will not be counted in computing the above ratios.

i. Direct care workers will not routinely perform such support functions as housekeeping, laundry, maintenance and meal preparation, where the performance of said functions will preclude

or interfere with the direct care workers' primary responsibilities to supervise and care for recipients. This will not preclude direct care workers from training residents in these functions pursuant to a written habilitation program developed in accordance with established procedures.

C. Conditions of Care in the Community

1. Embreeville residents will receive appropriate care and habilitation in community based settings, and will be protected from unreasonable risks to personal safety, unreasonable restraint and, where possible, regression in self care skills.

2. Prior to the movement of any resident to the community an individual transition plan will be developed through the person centered planning process. This plan will comport with current accepted professional standards and reflect a preference for normalized services. Within six months after the resident's placement in the community and annually thereafter, the team will develop an individual habilitation plan that meets the same standards.

3. The Monitor will review each placement plan for each resident prior to the resident being discharged to ensure that no Embreeville resident will be placed in the community until the Monitor is assured that all necessary services and support have been arranged and are ready to be provided in the community.

4. Service Coordination

a. Each former Embreeville resident will have a designated service coordinator in the community. This individual will be from the resident's county of choice and will coordinate the development and regular review of the person-centered plan and monitors and assures its implementation. Service coordinators may not have any direct affiliation with any agency that provides mental health/mental retardation services. In each county, there will be no fewer than

one service coordinator per 35 residents. Individual counties with better current ratios must maintain them. The service coordinator will regularly visit the resident at his or her home and at the resident's job or daytime activity.

b. Each resident will have an Interdisciplinary Team ("IDT") in the community, including, at a minimum, the resident, involved family members, the resident's service coordinator, persons with expertise in the services and support desired and needed by the resident and all persons needed to make appropriate professional decisions regarding the resident's care, habilitation and education.

#### 5. Service Coordinator Training

Each service coordinator will participate in pre-service and on-going training in person-centered planning and service delivery. The training curriculum will be that developed and currently used in the Southeast Region, as modified from time to time.

#### 6. Service Providers

a. Embreeville residents and their families will be provided with reasonable opportunities for choice of service provider and service coordinator, both initially (in planning for discharge from Embreeville) and on a regular basis thereafter.

b. No Embreeville resident will be placed in a community home that houses in total more than three individuals with disabilities, unless the resident, his/her family, or the Office of Mental Retardation can show the Monitor that an alternative placement would better meet the resident's individual needs. Defendants agree to provide technical assistance to counties to support the development of new agencies, subject to the availability of adequate staff.

## 7. Safety Net of Emergency Services

a. Embreeville residents who are placed into the community under the terms of this Agreement will be provided with the necessary supervision, habilitation, behavioral services, medical and psychiatric services necessary to ensure a successful placement. Embreeville residents who need such services after placement in the community are entitled to receive them under this Agreement.

b. The Court Monitor will, in the course of reviewing and approving placements under this Agreement, ensure that the placement includes, for all residents who need them, actual access to behavioral, medical and psychiatric services in the community. In this context, "actual access" means that a person or entity is actually in place and has agreed to provide the relevant service. The Monitor will also ensure that copies of all medical records and case histories are transferred to the custody of the service provider at the time of placement.

c. Emergency backup behavioral and support services will be provided for Embreeville residents who are transferred to the community. Embreeville residents who are transferred to the community will have access to backup behavioral services and respite care in the event that the residential provider is unable to successfully provide such services.

d. Under no circumstances will Embreeville residents be placed into public or private psychiatric hospitals because they exhibit behavior problems in the community. Under such circumstances, the resident is entitled to habilitation in the community, emergency behavioral services under Subparagraph 7.c., and respite placement. Psychiatric services, if necessary, will be provided in the community and not in a state mental hospital. In the event an Embreeville

resident has severe mental illness requiring a psychiatric hospitalization, an Embreeville resident may be admitted or committed to a community psychiatric facility. Any subsequent placement to a state psychiatric hospital may occur only with the approval of the Monitor.

c. If, in the opinion of the resident or their relative, guardian or advocate, an Embreeville resident's placement is not successful in that appropriate supervision or habilitation is not being provided, the Monitor will review the placement, and direct such changes as necessary, including but not limited to: additional supervision or habilitation; increased monitoring; or transfer to a new program which would provide a more safe and secure environment.

#### 8. Quality Assurance

a. Defendants will fund and assist in the establishment of County Consumer/Family Satisfaction Teams in Philadelphia and Delaware Counties. The Teams will monitor the care and services being provided to Embreeville residents.

1. The teams will operate under the authority of a County MH/MR Advisory Board.

2. The teams will have direct access to Embreeville residents and their families whose participation will be voluntary. The majority of team members will be consumers or family members.

3. All team monitoring results and findings will be provided directly to the MH/MR Administrator for any necessary action.

b. The parties will jointly establish a grievance system in which residents, parents, guardians or other advocates may file grievances with the State or County regarding the care, treatment or services being provided to any Embreeville resident. These grievances will be heard

within 14 days by an arbitrator selected by the complaining party from a list of potential arbitrators, all of whom will be independent, free of conflict of interest and mutually agreed upon by the parties. The complaining party and defendants will be given the opportunity to present any witnesses, documents or other evidence relating to the grievance to the arbitrator. The arbitrator will reach a decision regarding the merits of the grievance and any remedial action within 7 days. Defendants will comply with the arbitrator's decision. In exercising their rights under this paragraph, complainants will not be deemed to have waived their right to other administrative or judicial processes or remedies, nor will individuals be required to file a grievance before availing themselves of any other administrative or judicial process or remedy.

#### IV. MONITORING COMPLIANCE WITH THE PROVISIONS OF THE SETTLEMENT AGREEMENT.

In monitoring defendants' compliance with the terms and provisions of this Agreement, the parties agree to the following:

A. The parties will jointly select a Monitor to preside over issues regarding compliance with this Agreement and will jointly move the Court to appoint the Monitor for this purpose and to advise the parties regarding the status of compliance. The parties will also jointly select a panel of experts in the areas of medicine, psychology, physical and occupational therapy and psychiatry for the individuals with developmental disabilities ("Expert Panel") to assist and advise the Monitor upon his or her request as to the applicable professional standards for purposes of determining compliance. Before making any such request, the Monitor will consult with defendants to determine whether existing resources will provide the requisite information or whether the issue can be resolved without resort to the Expert Panel.



B. The documented and reasonable fees, costs and expenses of the Monitor and of the Expert Panel described above will be borne by the defendants. The parties believe that an initial budget of \$110,000 per year will be sufficient to pay these expenses. In the event that such funding is not sufficient to comply with the requirements of this agreement, the parties will negotiate in good faith to resolve the issue. In addition to this budget, the defendants will supply the Monitor with office space, telephone, copying and computer resources at Embreeville.

C. In addition to the duties, responsibilities and powers set forth above in this Agreement, the Monitor will have the following additional duties, responsibilities, and powers:

1. The Monitor will evaluate defendants' compliance with all aspects of this Agreement, and will submit regular reports to the parties as to the status of defendants' compliance. The Monitor will make recommendations to the parties regarding means of effectuating compliance.

2. The Monitor will attempt to resolve disputes between the parties and will make findings of fact regarding any dispute brought before him/her.

3. The Monitor will have the power to obtain any information, records and/or documentation pertaining to this Agreement and visit any site related to this Agreement.

4. The Monitor will investigate and report on allegations of abuse or neglect of individual residents.

#### V. TERMINATION AND ENFORCEMENT OF THIS AGREEMENT

- A. The Court will retain jurisdiction over this Agreement until its termination by the Court.

- B. This Agreement will extend at least until 12 months after the placement of the last resident from Embreeville into the community, at which time the Court will hold a hearing to

determine whether the Agreement will be terminated. At the termination hearing, the Court will hear testimony and argument from the Monitor, Expert Panel and parties as set forth below. At the termination hearing, the opinion of the Monitor and Expert Panel as to defendants' compliance will be accorded a rebuttable presumption by the Court. At the termination hearing, the parties may present evidence relevant to defendants' compliance with the Agreement. If the Court concludes that defendants have substantially complied with all requirements of this Agreement, it will terminate the Agreement.

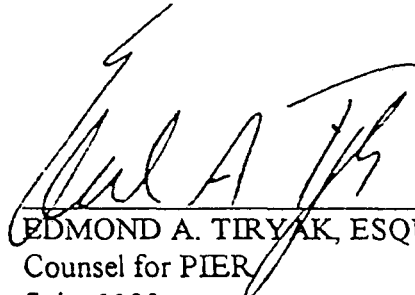
C. Eight months after the last Embreeville resident has been placed into the community, the Monitor and Expert Panel will conduct a full review of all aspects of defendants' compliance with the terms of this Agreement and will submit a report to the Court and the parties as to their findings concerning compliance no later than one month prior to the termination hearing. Defendants will correct all deficiencies noted by the Expert Panel. The Monitor and Expert Panel's review of compliance will be based on a 20% sample of Embreeville residents, unless they determine that a larger sample is necessary to make their determination of compliance. No party will challenge the Monitor and Panel's conclusions on the basis of sample size.

D. This Court will have continuing jurisdiction over claims for specific performance of this agreement. In the event that any plaintiff concludes that the defendants have failed to perform his or her obligations under this agreement, that plaintiff will provide defense counsel with written notice of that concern. The parties will then confer and attempt to resolve the asserted problem. In the event that the issue has not been resolved to the satisfaction of the plaintiff, the plaintiff may seek specific performance of this agreement from this Court.


E. The parties reserve the right to withdraw their consent to this Agreement in the event that this Agreement is not approved by the Court in its entirety.

AGREED TO BY THE UNDERSIGNED:

DEVAL L. PATRICK  
Assistant Attorney General  
Department of Justice  
Civil Rights Division

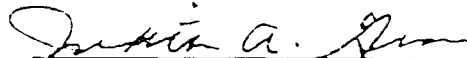
  
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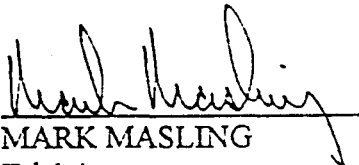
  
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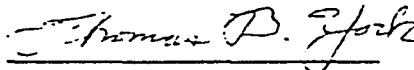
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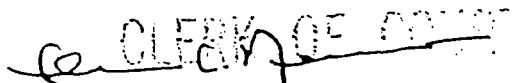


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SO ORDERED, this 30<sup>th</sup> day of Nov 1994. 12-1-94



Clarence C. Newcomer, Jr.

TERED: 12-1-94

CLERK OF COURT